No. 14,722

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD C. LAMKIN and ANTHONY B. SILVIA, *Appellants,*

v.

BROWN AND ROOT, INC., PACIFIC BRIDGE COMPANY, INC., MAXON CONSTRUCTION COMPANY, INC., UTAH CONSTRUCTION COMPANY, INC., and SWINNERTON AND WALLBERG, a co-partnership, joint adventurers doing business under the name of BROWN-PACIFIC-MAXON, *Appellees.*

Appeal From the Judgment of the District Court of Guam
Civil Case No. 65-54

BRIEF AMICUS CURIAE OF THE GOVERNMENT OF GUAM

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AUTHORITIES CITED

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PRELIMINARY STATEMENT

The Government of Guam, with the permission of this Court, submits the within brief amicus curiae in support of the judgment of the District Court of Guam.

OPINION BELOW

The opinion of the District Court of Guam from which this appeal is taken was rendered orally (R. 78-80), and is not reported.

JURISDICTION

This case was instituted by plaintiffs-appellants in the District Court of Guam to enjoin the defendants-appellees from honoring levies against the wages of the plaintiffs-appellants issued by the Commissioner of Revenue and Taxation of the Government of Guam to collect the income tax enacted by the Congress of the United States by Section 31 of the Organic Act of Guam, 64 Stat. 384, 392, 48 U.S.C., 1952 ed., Sec. 1421i; to enjoin the appellees from further withholding from the wages of appellants and other employees of the appellees in payment of such income tax; for an accounting to appellants and other employees for sums withheld from their wages in payment of such income tax since January 1, 1951; for money damages in favor of each appellant respectively in the amount of $25,000 for deprivation of their property without due process of law; and a money judgment in favor of appellant Lamkin in the amount of $504.26 with interest, being the amount of wages due appellant Lamkin but paid by appellees to the Government of Guam in response to the levy of the Commissioner of Revenue and Taxation.

Appellant Lamkin is a citizen of Colorado and appellant Silvia of California. Both are employed by appellees within the unincorporated territory of Guam where appellees are engaged in the construction of military installations for the United States. (R. 1, 54.)

Jurisdiction of the District Court of Guam is pursuant to Section 22(a) of the Organic Act of Guam, 64 Stat. 384, 389, 48 U.S.C., 1952 ed., Sec. 1424(a).

Appellants' complaint was filed October 28, 1954. (R. 3, 68.) Service of summons was made October 30, 1954. (R. 68).

On February 17, 1955, appellees filed a motion to dismiss because the complaint failed to state a claim upon which relief could be granted, and for summary judgment. (R. 12.) On the same date notice was given that the motion would be brought on for hearing on March 4, 1955. (R. 53.)

On March 3, 1955, appellants filed an amended complaint. (R. 54, 69.)

A hearing on the motion was held March 4, 1955, the District Court granting appellees' motion for summary judgment. (R. 71-80, 68.) Judgment granting the motion for summary judgment was entered March 15, 1955. (R. 63.)

Appellants filed notice of appeal on April 13, 1955. (R. 65.)

Jurisdiction is conferred on this Court by 28 U.S.C., Sections 1291 and 1394, as amended by the Act of October 31, 1951, c. 655, Sections 48 and 50(a), 65 Stat. 710, 726, 727.

STATEMENT OF THE CASE

The Government of Guam concurs in the statement set forth in appellees' brief, pages 4-12, as a complete and accurate presentation.

QUESTIONS PRESENTED

The questions presented are:

1. Whether as a matter of law the appellees were required to withhold from appellants' wages and to honor distraints upon appellants' wages in payment of an income tax obligation to the Government of Guam pursuant to Section 31 of the Organic Act of Guam.

2. Whether the existence of any genuine issue of fact precluded the granting of the motion for summary judgment.

3. Whether the filing of the amended complaint precluded the granting of the motion for summary judgment.

STATUTES AND RULES INVOLVED

Organic Act of Guam, c. 512, 64 Stat. 384:

"Section 3. Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this Act and shall have power to sue by such name. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct." (48 U.S.C. 1952 ed., Sec. 1421a.)

"Section 6(a). The executive authority of the government of Guam shall be vested in an executive officer, whose title shall be 'Governor of Guam', and shall be exercised under the supervision of the head of the department or agency referred to in section 3 of this Act. * * *

(b) The Governor shall have general supervision and control of all executive agencies and instrumentalities of the government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam. * * * He shall have the power to issue executive regualtions not in conflict with an applicable law. * * *

(c) The Governor shall coordinate and have general cognizance over all activities of a civil nature of the departments, bureaus, and offices of the Government of the United States in Guam." (48 U.S.C. 1952 ed., Sec. 1422.)

"Section 9. * * *

(b) The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers

and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law.

(c) The Governor shall, from time to time, examine the organization of the executive branch of the government of Guam, and shall determine and carry out such changes therein as are necessary to promote effective management and to execute faithfully the purposes of this Act and the laws of Guam.

* * * (48 U.S.C. 1952 ed., Sec. 1422c.)

"Section 30. All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets." (48 U.S.C. 1952 ed., Sec. 1421h.)

Section 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam." (48 U.S.C. 1952 ed., Sec. 1421i.)

Internal Revenue Code of 1939:

"Section 1621. Definitions.

As used in this subchapter—

* * *

(e) Number of withholding exemptions claimed.

The term 'number of withholding exemptions claimed' means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 1622(h), except that if no such certificate is in effect, the number of withholding ex-

emptions claimed shall be considered to be zero." (26 U.S.C. 1952 ed., Sec. 1621(e).)

"Section 1623. Liability for Tax.

The employer shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and shall not be liable to any person for the amount of any such payment." (26 U.S.C. 1952 ed., Sec. 1623.)

"Section 3690. Authority to Distrain.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid." (26 U.S.C. 1952 ed., Sec. 3690.)

"Section 3692. Levy.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy." (26 U.S.C. 1952 ed., Sec. 3692.)

"Section 3710. Surrender of Property Subject to Distraint.

(a) Requirement.—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for Violation.—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

* * *'' (26 U.S.C. 1952 ed., Sec. 3710.)

Federal Rules of Civil Procedure.

''Rule 56. Summary Judgment.

* * *

(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.''

SUMMARY OF ARGUMENT

1. Appellants contend that their employers, the appellees, are acting illegally in withholding from their wages, honoring distraints upon their wages, and turning the proceeds over to the Government of Guam in payment of the income tax imposed by Section 31 of the Organic Act of Guam. According to appellants, Section 31 merely extends the

income tax laws of the United States to Guam as a Federal tax and that consequently it is illegal for appellees to pay such proceeds to the Government of Guam and officials of the Government of Guam have no authority to enforce the tax.

Appellees contend, in accordance with the decision of this Court in *Laguana* v. *Ansell,* (CA 9, 1954) 212 F. 2d 207, affirming the decision of the District Court of Guam, (DC Guam, 1952) 102 F. Supp. 919, certiorari denied, 348 U.S. 830, 75 S. Ct. 51, 99 L. Ed. 32, that Section 31 creates a separate territorial income tax to be enforced by the Government of Guam.

The *Laguana* decision, which is not even mentioned by appellants, cites the legislative history of Section 31. It is shown that the separate tax therein provided was derived from a comparable tax enacted by Congress for the Virgin Islands.

The obvious purpose of Section 31 was to change existing law and provide revenue for the new territorial government. Under appellants' construction, however, this would not be accomplished because of the exemption provisions as to income derived from Guam.

Appellants' objections to the lack of authority of Harry L. Mangerich and the tax enforcement officials of the Government of Guam is again based on appellants' interpretation of Section 31. Since, however, Section 31 creates a territorial tax the objection fails.

The term "income-tax laws" as used in Section 31 is not limited to tax rates, exemptions and deductions but includes the various enforcement procedures of the Internal Revenue Code. Without these enforcement procedures, such as authority to make assessments and levies, to distrain on property, and take other measures to collect the tax, the Government of Guam would be unable to carry out the intent of Congress in providing the tax.

The power to enforce the territorial tax comes from the Organic Act itself, the primary responsibility being in the Governor of Guam who in turn may designate subordinate officials to carry out enforcement.

2. The instant case presents no genuine issue of any material fact that would make the granting of the summary judgment improper. There is in effect agreement between appellants and appellees as to the basic facts, and their differences are in regard to the legal conclusions to be drawn from these facts.

3. The filing by the appellants of an amended complaint, on the day before the hearing of appellees' motion for summary judgment, did not preclude the District Court from granting the motion. The amended complaint presented no new allegations raising an issue of fact or in any way justifying the denial of appellees' motion.

ARGUMENT

INTRODUCTION

The instant case is the third of three appeals from the District Court of Guam presently pending before this Court, all of which raise the same common fundamental question of law. The other two cases, *Wilson* v. *Kennedy,* No. 14,593, and *Phelan* v. *Taitano,* No. 14,585, were heard and submitted on December 12, 1955.

The common question of law in all these cases is whether or not Section 31 of the Organic Act of Guam creates a separate territorial income tax to be enforced by the Government of Guam.

This question has already been decided in the affirmative by this Court in *Laguana* v. *Ansell,* (CA 9, 1954) 212 F. 2d 207, affirming the District Court's opinion, (DC Guam, 1952) 102 F. Supp. 919. The Supreme Court denied certiorari, 348 U.S. 830, 75 S. Ct. 51, 99 L. Ed. 32. It may be noted that the United States intervened in the *Laguana* case in support of the separate tax construction.

I

Appellees Were Required as a Matter of Law to Withhold From Appellants' Wages and to Honor Distraints Upon Appellants' Wages in Payment of an Income Tax Obligation to the Government of Guam Pursuant to Section 31 of the Organic Act of Guam

The affidavit of J. Russell Marshall, project manager for the appellees in Guam, in support of appellees' motion for summary judgment (R. 13-53), in effect concedes the substance of the allegations of fact in the complaint but indicates that the actions of the appellees were in response to law.

Whether or not appellees have acted in response to law in withholding wages from the appellants and other employees, in honoring levies on the wages of appellants, and in turning the proceeds over to the Government of Guam depends upon the interpretation to be given Section 31 of the Organic Act. This section reads as follows:

> "Section 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam."

The contention of the appellees, which has also been the position of the United States and the Government of Guam in prior litigation, is that Section 31 creates a separate territorial income tax, payable to the Government of Guam, and to be enforced by the Government of Guam.

Appellants' contention is summarized (Appellants' Brief, 42-43) as follows:

> "Appellants wish to make clear their position that they executed Federal withholding forms authorizing withholding for Federal taxes due, if any, and for no other purpose. That they believe the plain text of the Organic Act of Guam does not create a local tax but does confer upon the territorial Government the proceeds of any Federal taxes derived from Guam, and

that lacking any statutory authority or delegation no local official possesses any legal right, duty or authority to perform any actions in connection with income tax, and therefore, all acts of such officers as set forth in the affidavit of Mr. Marshall are unwarranted and constitute no valid defense to appellees.

* * * * *

"Appellants deem it clear that the District Court of Guam holds that there exists in Section 31 of the Organic Act (1421i T 48 U.S.C.A.) a separate and distinct local income tax, similar in text to the Federal, though changed in certain respects.

"The District Court of Guam in reaching this conclusion, we submit, ignored the canons of statutory construction, and is either legislating judicially or accepting the executive legislative acts of the Government of Guam. The District Court of Guam further ignores the provisions and plain meaning of Section 30 of the Organic Act of Guam (1421h T 48 U.S.C.A.). It is believed that both sections should be read together, the one by its plain text extends the Federal income tax statutes to embrace Guam; the other giving to the local Government the proceeds of Federal taxes, no mention being made of local taxes."

The same basic legal question underlying the present case was decided by this Court in *Laguana* v. *Ansell,* supra.

In the *Laguana* case plaintiff Laguana sued defendant Ansell, the Acting Tax Commissioner and Acting Treasurer of the Government of Guam, for a refund of the tax withheld from his wages and paid into the Treasury of Guam. The factual situation is thus identical with the instant case in so far as appellants are objecting to the actions of the appellees in withholding from wages of the appellants and their other employees and paying the proceeds to the Government of Guam.

The opinion of the District Court, under date of February 29, 1952, states at page 920 and following of 102 F. Supp. 919:

"The position taken by the taxpayer is that Sec. 31 made applicable to Guam the Federal income-tax laws as such, including any provisions granting exemptions from taxation on income derived from sources within possessions of the United States, 26 U.S.C.A., Sections 251 and 252.

"The position taken by the governments is that the effect of Sec. 31 is to set up a separate income-tax system for Guam which is a duplicate of the Federal income-tax system; that the United States Congress in exercising its authority to legislate for the unincorporated territories and possessions has established a separate and distinct taxing jurisdiction which contemplates collection of the tax by territorial officials for the use and benefit of the inhabitants of the territory; that in the alternative the taxpayer cannot be heard to complain in the instant case as the tax was owing and reached the eventual source for which it was intended.

* * * * *

"It seems to me that it is little more than vagrant intellectual exercise to assume that in these days of great challenge the United States Congress intended by Sec. 31 to do less than impose the full burden of income taxation, measured by the Federal tax, in this unincorporated territory. Even the very limited discussion indicates that the Congress was fully aware of the fact that it was taxing those who may have previously come within one or more of the exemptions in 26 U.S.C.A., Section 251 and 252.

"The United States Treasury Department has construed Sec. 31 as establishing a territorial tax to be administered by the officials of the Guam government and the United States supports that holding, 1951-6-13559, I.T. 4046. The taxpayer has therefore complied with the instructions of both governments in meeting his tax liability and his tax has covered into the treasury of Guam. He cannot now be heard to say that the tax should be returned to him in order that it be paid to the United States and returned to the Guam treasury from which it was taken. The case of Stone v. White, 301 U.S. 532, 57 S. Ct. 851, 81 L. Ed. 1265, disposes of any such contention.

"The question remains as to whether Sec. 31 imposes a Federal tax to be collected by the United States or a territorial tax to be collected by the Government of Guam.

* * * * *

"As the governments point out, however, in those instances when Congress has made the income-tax laws in force in the United States applicable to possessions it has in the two major instances of the Philippines and Puerto Rico directed that such tax was to be collected by the territorial governments; and the courts have held that the effect of such legislation was to levy a territorial tax. Lawrence v. Wardell, 9 Cir., 273 F. 406; Robinette v. Commissioner of Internal Revenue, 6 Cir., 139 F. 2d 285. Later both the Philippines and Puerto Rico were given authority to adopt their own income-tax laws.

"The Naval Appropriations Act of 1921, 42 Stat. 122, 123, contained the following proviso: 'That the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, *except that the proceeds of such taxes shall be paid into the treasuries of said islands.*' (Italics supplied.)

"It does not appear that this proviso has been the subject of reported litigation but the United States Treasury construed it in its opinion I.T. 2946 (C.B. X14-2, 109 (1935)) as establishing separate and distinct taxing jurisdictions although their income-tax laws arose from an identical statute applicable to each. In its opinion I.T. 4046, 1951-6-13559 is similarly construed Sec. 31, supra, as establishing a separate territorial tax in Guam and that Section 251(a) of the Internal Revenue Code is applicable insofar as taxes due the United States are involved.

"Regardless of my initial view that Sec. 31 imposed a Federal tax to be collected by the United States, I believe that I shall add to any existing confusion by persisting in that view in the light of the position taken by the governments involved and my conviction that in any event a tax is imposed. I hold that the

> effect of Sec. 31 is to impose a territorial tax to be collected by the proper officials of the Government of Guam."

This Court affirmed the decision of the District Court on April 15, 1954 by stating, 212 F. 2d 207:

> "For the reasons given in the Court's opinion filed February 29, 1952, 102 F. Supp. 919, the judgment is affirmed."

The appellants in the instant case are thus in effect asking that the *Laguana* decision be overruled. However, they do not ask this expressly. In fact the appellants completely ignore the *Laguana* case! They argue as if the present appeal were a case of first instance—as if the *Laguana* case had never been filed and determined.

In contending that Section 31 merely "extends the Federal income tax statutes to embrace Guam," the proceeds of which are given to the Government of Guam pursuant to Section 30 (Appellants' Brief, 43), appellants fail to mention that their interpretation of Section 31 would effect no significant change in prior existing law.

The United States income tax has long applied to income earned in Guam by United States citizens, but the exemption provided by Section 251 of the United States Internal Revenue Code of 1939[1] permitted an avoidance of the tax with reference to income earned in Guam, Guam being a "possession" as used in the section. Taxpayers who were citizens of Guam but not of the United States were also granted an exemption by Section 252(a).[2] Further, under Section 1621(a)(8)(B),[3] wages coming under the exemption were not subject to withholding.

---

1 Section 931 of the Internal Revenue Code of 1954.

2 Section 932(a) of the Internal Revenue Code of 1954.

3 Section 3401(a)(B) of the Internal Revenue Code of 1954.

The purpose of Section 31, however, as shown in its legislative history, recited in the *Laguana opinion,* 102 F. Supp. at pages 920-921, was to tax income earned in Guam which had previously escaped taxation. At the time it was also intended to grant this additional revenue to the Government of Guam for its support. Under appellants' interpretation this two-fold purpose would be completely frustrated.

Thus appellants argue that under Section 1621(a)(8)(B) of the Internal Revenue Code of 1939 the withholding provisions do not apply to their wages. (Appellants' Brief, 27, 32.) They also argue for the continued application of the exemption provided by Section 251 of the Internal Revenue Code of 1939. (Appellants' Brief, 56.)

In ruling that Section 31 established a separate territorial tax, the District Court in the *Laguana* opinion ruled that these provisions did not apply. Thus in the opinion, page 921 of 102 F. Supp. it is stated:

> "Even the very limited discussion indicates that the Congress was fully aware of the fact that it was taxing those who may have previously come within one or more of the exemptions in 26 U.S.C.A. Sections 251 and 252."

In its formal conclusions of law in the *Laguana* case (not included in the opinion) the Court was explicit as to the withholding exemption:

> "Although upon the facts as found by the Court, the plaintiff fulfills the requirements of Section 1621(a)(8)(B) of the Internal Revenue Code of the United States, the benefits of that section are not available to plaintiff by virtue of Section 31 of the Organic Act of Guam."

Sections 251 and 252(a) continued to apply, of course, after the enactment of Section 31, with regard to the Federal income tax. But, as has been indicated, they have no

application to the separate territorial tax created by Section 31.

In this connection it is pointed out that in the Internal Revenue Code of 1954, passed after the decision of this Court in the *Laguana* case, Sections 931 and 932(a) remain substantially identical to the former comparable Sections 251 and 252(a). However, an additional provision, Section 932(c), has been added making specific reference to the application of the United States income tax laws to Guam under Sections 30 and 31 of the Organic Act.

Even more striking approval by Congress of the decision in the *Laguana* case has been indicated by Public Law 321, 84th Congress, approved August 9, 1955, which amends in part Section 3401 of the Internal Revenue Code of 1954 to read as follows:

> "Sec. 3401. Definitions.
>
> (a) Wages. For purposes of this chapter, the term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—
>
> * * * *
>
> (8)(A) for services for an employer (other than the United States or any agency thereof)—
>
> (i) performed by a citizen of the United States, if, at the time of the payment of such remuneration, it is reasonable to believe that such remuneration will be excluded from gross income under section 911; or
>
> (ii) performed in a foreign country *or in a possession of the United States* by such a citizen if, at the time of the payment of such remuneration, the employer is required by the law of any foreign country *or possession of the United States* to withhold income tax upon such remuneration; * * *"
> (Amendment to prior law indicated by italics.)

The effect of this amendment, adding the reference to "possession of the United States," is to exempt from the United States withholding tax any income which is subject to withholding by a possession of the United States.

"Possession" includes, of course, the unincorporated territory of Guam. Section 25, Organic Act of Guam; 48 U.S.C., 1952 ed., Section 1421c(b).

The legislative history of Public Law 321, shows that Senate Report No. 1244, July 29, 1955, of the Senate Committee on Finance accepted House Report No. 1354, July 23, 1955, of the House Committee on Ways and Means, which states, in part:

> "Reasons for Bill
>
> Under present law the wages of a United States citizen employed in Puerto Rico or a possession of the United States may under certain circumstances be reduced by withholding for the income tax of Puerto Rico or the possession as well as for the Federal income tax. This is true even though eventually the foreign tax credit in these cases usually relieves the taxpayer of most or all of the Federal income tax liability. This has presented especially serious problems in the case of Puerto Rico although the problem also exists to a lesser extent in the case of the Virgin Islands *and Guam.* As a result of this double withholding, potential employees are reluctant to take jobs in Puerto Rico or the possessions. Moreover, the Internal Revenue Code already relieves United States citizens who perform services in a foreign country (for an employer other than the United States) from the withholding of the Federal income tax where withholding of a foreign income tax is provided." (Italics added.)
>
> 1955 U. S. Code Congressional and Administrative News, No. 14, August 20, 1955, page 4294.

Laguana v. *Ansell* has been followed in the District Court of Guam by a number of other cases.

Wilson v. *Kennedy,* supra, appeal presently pending in this Court, is similar to the instant case in that the basic issue as to the proper interpretation of Section 31 is raised by objecting to withholding from wages in payment of the territorial tax and also by claiming officials of the Government of Guam have no authority to enforce the tax. The plaintiffs are two employers and two employees of a different employer. The defendants are the then Commissioner of Revenue and Taxation, the Governor, Attorney General, and Director of Finance. Plaintiffs sought a refund of taxes collected, an injunction against future enforcement, and a declaratory judgment that there is no territorial income tax.

The *Wilson* case goes beyond the *Laguana* case among other points in regard to the question of the alleged lack of authority of officials of the Government of Guam to collect the tax, and as to whether the term "income-tax laws" as used in Section 31 includes enforcement provisions.

It is stated in the District Court's Opinion, page 158 of 123 F. Supp.:

> "The plaintiffs in the instant case apparently contend, however, that there are no officials of the Government of Guam who have authority to collect the tax and that those officials who pretended to exercise such authority must repay the amounts collected. In the first place we must distinguish between Section 31, which makes the income tax laws in force in the United States of America, current and future, in force in Guam, and any authority the Guam Legislature may have to legislate in the field. The United States Congress as the parent legislative body made the 'income tax laws' applicable. We are dealing with a law of the United States. In this complex field it would appear that the Congress intended to do more than just levy taxes. It intended that the taxpayer on Guam should be governed by the income tax laws in force in the United States at any given time. Like

the taxes themselves, enforcement of collection must necessarily vary or change at the will of the Congress. If the Government of Guam has available facilities to carry out that will, a taxpayer can hardly be heard to complain that he would prefer some different system of collection. * * *

"The individual defendants are:

"(a) The Governor of Guam who is charged with responsibility faithfully to execute the laws of the United States applicable to Guam and the law of Guam, 48 U.S.C.A. 1422(b), 64 Stat. 386.

"(b) The Attorney General of Guam who is head of the Department of Law for that government, Government Code of Guam, Section 5101.

"(c) The Director of Finance who is the head of the Department of Finance, Government of Guam, Government Code of Guam, Section 5100.

"(d) Commissioner of Revenue and Taxation who enforces and administers the territorial income tax (affidavit of Director of Finance).

"In the view of this court these plaintiffs can rest secure that those defendants are neither interlopers nor imposters but that they are the duly appointed officials whose responsibility includes the collection of income taxes under Section 31, the appropriate provisions of the United States Revenue Code, and applicable laws of Guam.

* * * * *

"The applicable provisions in the United States Revenue Code to enforce the payment of the territorial income tax are 'income tax laws' within the meaning of section 31 and are available to the Director of Finance or those authorized by him, subject to those non-substantive changes in nomenclature as are necessary to avoid confusion as to the taxing jurisdiction involved."

In the instant case these points decided in the *Wilson* case are again raised. Appellants object to the lack of authority of the tax enforcement officials of the Govern-

ment of Guam. (Appellants' Brief, 42, 49, 51, 52, 53.) The complaint more specifically objects to the lack of authority of Harry L. Mangerich on behalf of the Government of Guam, to make assessments and levies, and to interpret, construe, administer and enforce the tax created by Section 31. (R. 3, 5, 6, 8, 54, 56, 57, 58.)

However, appellants' objection as to the alleged lack of authority is founded again on the basic contention that there is no territorial income tax. Since the separate tax has been established by the *Laguana* case, the objection necessarily fails.

Thus there is no question of any delegation of power from the United States Commissioner of Internal Revenue to officials of the Government of Guam. (Appellants' Brief, 42, 49, 52.) Nor is it necessary for Congress to specify in the Internal Revenue Code that it is to be enforced in Guam by officials of the Government of Guam.

Rather, since Section 31 creates a territorial tax, separate and distinct from the Federal income tax, the authority of officials of the Government of Guam to enforce it stems from the Organic Act itself. As mentioned in the *Wilson* case, supra, the Governor of Guam has the general responsibility of executing the laws of the United States applicable to Guam and the laws of Guam. Section 6(b), Organic Act. The Governor in turn may designate subordinate officials to perform these enforcement functions. Sections 6(b), 9(b) and (c), Organic Act.

Appellants' argument (Appellants' Brief, 53) that without legislation by the Legislature of Guam there can be no local authority to enforce the alleged separate territorial tax is without basis. The authority to enforce comes direct from the Organic Act and no local implementation by the Legislature of Guam is necessary. Appellants' argument would give the local legislature a veto power over a tax imposed by Congress. As stated by the Appellate Division, District Court of Guam, in *Government of Guam* v.

Kaanehe, Criminal Case No. 6-A, decided January 23, 1956, (further discussed, infra) and as yet not reported:

> "The Organic Act of Guam needs no local implementation nor publication to make it effective, other than as provided by 64 Stat. 393, 48 U.S.C. 1421, note."

As indicated in the *Wilson* case, the term "income-tax laws" must be interpreted broadly to embrace all enforcement procedures provided in the Internal Revenue Code, including the summary powers of levy and distraint under Sections 3690 and 3692 of the Internal Revenue Code of 1939,[4] if there is to be an efficiently administered tax as Congress intended. Further, these procedures are available to the tax officials of the Government of Guam.

The broad scope of the term "income-tax laws" as used in Section 31 is further shown in *Holbrook* v. *Taitano,* (D.C. Guam, 1954) 125 F. Supp. 14. This was a suit to enjoin tax officials of the Government of Guam (including Mr. Mangerich, referred to by appellants in their complaint and brief in the instant case) from enforcing the tax. Defendants filed a motion to dismiss. The Court held that Section 3653 of the Internal Revenue Code of 1939 and Section 7421 of the Internal Revenue Code of 1954 applied as part of the separate territorial tax and prohibited the Court from maintaining the suit to enjoin. The complaint was dismissed for lack of jurisdiction. No appeal was taken.

In *Phelan* v. *Taitano,* supra, presently pending before this Court, the District Court of Guam dismissed a similar suit to enjoin collection of the tax and for judgment against Mr. Taitano, the Director of Finance, and Mr. Mangerich, for sums collected by them in payment of taxes by distraint on plaintiffs' bank accounts. There was no reported opinion.

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[4] Section 6331(a) and (b) are the comparable provisions of the Internal Revenue Code of 1954.

The latest decision of the District Court of Guam on the scope of the term "income-tax laws" was made by the Appellate Division on January 23, 1956, in the case of *Government of Guam* v. *Kaanehe,* Criminal Case No. 6-A, already quoted supra.

The Island Court of Guam, an inferior court having jurisdiction over misdemeanors, had dismissed for lack of jurisdiction a criminal prosecution based upon violation of Section 145(a), Internal Revenue Code of 1939, failure to file a tax return, as made applicable as a law of Guam by Section 31. The Government of Guam appealed. In an opinion by Judge McLaughlin, United States District Judge, Hawaii, concurred in by Judge Shriver, District Judge, Guam, and Judge Wiig, United States District Judge, Hawaii, the Appellate Division of the District Court reversed the Island Court, holding that Section 145(a) of the Internal Revenue Code was adopted by reference as part of the separate territorial income tax when Congress enacted Section 31. The Court said:

> "An entire code of laws, including criminal provisions, may be adopted by reference. In so doing, it is not necessary to repeat the adopted code. Engel v. Davenport, 271 U.S. 33 (1926); Ex Parte Krause, supra; United States v. Davis, 71 F. Supp. 749 (D.D.C. 1947). If the reference is clear, the adopted code is to be applied in toto, unless there is an indication to the contrary in the language of the enactment. Here, there is nothing in either the statute or its legislative history to suggest that Congress wished to adopt only part of the income tax laws of the United States for Guam. U. S. Code, Congressional Service, 81st Congress, Second Session 1950, Vol. 2, p. 2856. Any other conclusion would arbitrarily destroy the effectiveness of Sec. 31."

In the instant case, since Section 31 creates a separate territorial income tax, appellees have an expressed and specific defense to appellants' claim with regard to withholding in Section 1623 of the Internal Revenue Code of 1939, and Section 3403, the comparable provision of the Internal Revenue Code of 1954. These provisions are a part of the separate territorial tax law.

Similarly, with regard to honoring the distraints on appellants' wages, appellees were bound to comply by Section 3710 of the Internal Revenue Code of 1939 under the penalty of personal liability. Such compliance is a defense to an employer in an action by an employee who sues for his wages, as shown in *Antrum* v. *United States,* (D.C. Conn., 1953) 127 F. Supp. 54, where the Court granted a motion to dismiss the complaint, saying:

> "It fails to state a claim against the employer, Seymour Manufacturing Company, on which relief may be granted, for it sets up payment or surrender by the employer upon a valid distraint for taxes due."

It is submitted that on the basis of the *Laguana* decision, holding that Section 31 creates a separate territorial tax, the ruling of the District Court in the instant case was correct.

II

There Is No Genuine Issue as to Any Material Fact

Under Rule 56 it is provided that summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Appellants contend (Appellants' Brief, 19-26) that there are numerous issues of fact in the instant case and that the court accordingly erred in granting the summary judgment.

However, a reading of the complaint and amended complaint (R. 3-10, 54-62) together with the affidavit of Mr. Marshall and exhibits filed in support of appellees' motion (R. 13-53) shows no substantial variance as to any material facts.

Appellants themselves concede this (Appellants' Brief, 41):

> "Appellees caused to be filed in support of their motion to dismiss and for summary judgment an affidavit of Mr. Marshall, together with supporting exhibits. Appellants concede that Mr. Marshall did accurately relate clearly and correctly all the facts which are material. The status of the appellees within Guam, their work, the employment of appellants, the receipt of the levies and warrants of distraint, their withholding of pay as authorized by United States tax withholding forms executed by appellants, and the turning over to agents of the Government of Guam of the sums withheld from appellants' pay upon the demand of agents of Guam.
>
> Appellants concede that the alleged warrants of distraint, the levies, their employment contracts and United States withholding forms are correct."

It is obvious that the only genuine, material differences between the parties are questions of law not of fact—whether the appellees were legally required to withhold from the wages of the appellants and their other employees and to honor distraints upon appellants' wages and pay the proceeds to the Government of Guam under the income tax enacted by Section 31 of the Organic Act. It is a question of the interpretation of Section 31—whether it creates a separate territorial tax to be enforced by the Government of Guam as contended by the appellees and as held by this Court, or whether it merely extends the United States income tax to Guam as a Federal tax as contended by appellants.

Appellants' further comment on Mr. Marshall's affidavit (Appellants' Brief, 41) seems to agree that the issue is only one of law:

> "Appellants do not concur in the conclusion of the affidavit, that the action of appellees was lawful, that it was in response to lawful authority, or that there is any justification in law for the actions of appellees."

At the hearing (R. 75), counsel for appellants even more concisely stated the basic legal issue:

> "The Court: * * * What relief do you expect the court to grant here?
>
> Mr. Phelan: *I want BPM to stop withholding from my client money that is owed to the United States in tax.*
>
> The Court: In other words, you want to reach the question as to whether your client owed the tax?
>
> Mr. Phelan: *The question is has BPM any right to withhold the tax.*" (Italics supplied)

Appellants argue (Appellants' Brief, 22) that to justify the granting of a summary judgment:

> "An affidavit cannot controvert a fact well pleaded and the moving party must clearly demonstrate that no controverted issue of fact remains."

Even if it were conceded that there are any well pleaded facts in the complaint or amended complaint (as distinct from conclusions of law) which are controverted in Mr. Marshall's affidavit, appellants' contention is not sound.

Thus it is stated in 6 Moore's Federal Practice (2d ed.), Section 56.11 (3), page 2068:

> "There are some holdings, but mostly judicial statements, to the effect that an amendment of fact in a pleading cannot be overcome by an affidavit and hence in such a case a motion for summary judgment must be denied. This doctrine overlooks the fact that one of the prime purposes of summary judgment procedure is to pierce the pleadings; and the doctrine, if applied, would largely nullify the summary judgment procedure. The true rule is opposed to the foregoing doctrine. Summary judgment should be rendered, even though an issue may be raised formally by the pleadings, where the supporting affidavits and the opposing affidavits, if any, show that there is no genuine issue of material fact."

This view finds support in the following decisions of this Court:

Lindsey v. *Leavy,* (CA 9, 1945) 149 F. 2d 899
Leishman v. *Radio Condenser Co.,* (CA 9, 1948) 167 F. 2d 890
Koepke v. *Fontecchio,* (CA 9, 1949) 177 F. 2d 125

That the sole question is one of law, turning on the interpretation of Section 31 of the Organic Act, is further indicated by the fact that appellants nowhere allege in their complaints or brief any claim that, assuming there is a separate territorial tax, the amounts of the assessments against the appellants are erroneous, or that there was any failure to give required notices, or make required demands, or comply with other required procedures by any tax enforcement officials of the Government of Guam.

Even with regard to Mr. Mangerich, appellants refer to him as "claiming to be Commissioner of Revenue and Taxation for the Government of Guam" (R. 5, 56) but nowhere deny that he actually held that office at the time the action was commenced.[5]

Appellants further allege (R. 3, 54) that the action is brought to enjoin the appellees "from obeying certain orders, directives and levies issued by employees, agents, servants and attorneys of the Government of Guam *under claim of right and alleged color of law claimed to exist under the laws of the United States, particularly the Revenue Act of 1954 and the Organic Act of Guam, Chapter 8A, Title 48, U.S.C.A.* as hereinafter fully appears." (Italics added.)

If there were any contention of fact as to Mr. Mangerich's appointment or official position, or that of any other officer or employee engaged in enforcing the territorial income tax, it was incumbent on appellants to allege the facts in their

[5] In *Phelan* v. *Taitano,* supra, pending before this Court, Mr. Mangerich is one of the defendants.

pleadings, or counter the affidavit of Mr. Marshall wherein he refers to such officials.

As stated by this Court in *Gifford* v. *Travelers Protective Association* (CA 9, 1946) 153 F. 2d 209:

> "Where a defendant presents evidence on which it would be entitled to a directed verdict if believed and which the plaintiff does not discredit as dishonest, it rests on the plaintiff in opposing defendant's motion for summary judgment, at least to specify some opposing evidence which it can adduce and which will change the result."

As it is, the question of Mr. Mangerich's appointment to office, or that of other Government of Guam officials, is not an issue in the instant case. It turns instead, as far as the authority of officials is concerned, on the question of law whether the Organic Act gives them authority to enforce the tax imposed by Section 31 and whether enforcement procedures of the Internal Revenue Code are available to them. These are issues of law.

Appellants allege as an example of a genuine material issue of fact their contention that appellees have breached their employment contract and this is a suit for breach of contract. (Appellants' Brief, 21.) Yet if appellees must comply with the provisions of the separate territorial income tax, a question of law, they have a defense and there is no breach of contract.

Appellants also contend (Appellants' Brief, 20):

> " * * * that they have not authorized appellees to withhold any sums except for taxes due to the United States. Exhibits 'C' and 'E' to Mr. Marshall's affidavit support this. Yet, appellees assert that they have paid such sums to the Treasurer of Guam."

Exhibits "C" and "E" (R. 37, 40) are in no sense "authorizations" to the employer to pay taxes. They are what their title indicates—Form W-4, "Employee's With-

holding Exemption Certificate." Withholding is not dependent upon the execution of one of these forms by the employee. The employer is not the agent of the employee. Withholding is required by provisions of the income tax law and Form W-4 merely affords the employee a means to claim his exemptions for the determination of the rate of withholding. If he does not execute Form W-4, he is still subject to withholding but without the benefit of any exemptions. Section 1621(e), Internal Revenue Code of 1939.[6]

It is submitted that further analysis of appellants' examples of issues of fact are unnecessary.

In each instance the issue of fact turns on the interpretation of Section 31 of the Organic Act.

If the instant case were to go to trial, it is submitted that no evidence could be offered by appellants that would change the result in their favor.

III

The District Court Correctly Held That the Filing of the Amended Complaint Did Not Preclude the Granting of Appellees' Motion for Summary Judgment

Appellees' motion for summary judgment, with the affidavit of Mr. Marshall attached, and notice of hearing of the motion, were filed February 17, 1955, and served upon appellants the same date. The hearing was set for March 4, 1955. (R. 53.)

Appellants did not serve or file any opposing affidavits, but filed an amended complaint on March 3, 1955, the day before the hearing on appellees' motion.

Appellants contended at the hearing (R. 72), and again in their brief (Appellants' Brief, 33-34) that since by Rule 15 they were entitled to file an amended complaint as a

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[6] Section 3401(e), Internal Revenue Code of 1954.

matter of right, the appellees, in order to reach the amended complaint, would have to file a new motion or at least re-file their pending motion.

Appellants' contention is erroneous, however, in so far as it is claimed there is any automatic termination of the pending motion by the mere filing of the amended pleading. An intervening amended pleading that is of a technical nature or is not substantially different from the original, does not preclude the granting of a summary judgment on the pending motion. As set forth in 6 Moore's Federal Practice (2d ed.) Section 56.10, pages 2056-2057:

> "For if during the pending of a motion for summary judgment, the adverse party amends his pleading as of course or is permitted to do so by the Court, the amendment need not defeat the pending motion, unless the amendment is substantial and real and not a mere change in form."

This principle is also set forth in:

Gordon Corp. v. *Cosman,* (1931) 232 App. Div. 280, 249 N.Y.S. 544

Kowalewski v. *City of Hastings,* (DC Minn., 1953) 112 F. Supp. 825

Park-In Theaters, Inc. v. *Paramount-Richards Theaters,* Inc., (DC Del., 1949) 9 F.R.D. 267 (where motion was held defeated because of substantial changes in the amended complaint).

In a somewhat analogous situation this Court ruled in *Leishman* v. *Radio Condenser Co.,* (CA 9, 1948) 167 F. 2d 890:

> "On June 21, 1946, while the motion for summary judgment was pending, Leishman moved for leave to file a supplemental answer, a copy of which appears in the record. The motion was denied. Leishman contends that the denial was error. This contention need not be considered, for even if the supplemental answer had been filed, still the pleadings together with

> the affidavits, would have showed there was no genuine issue as to any material fact and that Condenser and General were entitled to a judgment as a matter of law. Assuming, therefore, without deciding, that it was error to the motion, Leishman was not prejudiced thereby."

In the instant case it is submitted that the amended complaint presents no new allegations that could possibly raise an issue of fact or would have justified the denial of appellees' motion for summary judgment by the District Court.

The fourth count realleges the first and third counts of the amended complaint and then adds:

> "2. That defendants, conspiring with one Harry L. Mangerich, who claims to be a duly appointed Commissioner of Revenue and Taxation of the unincorporated territory of Guam, and other officials of the Government of Guam unknown to plaintiffs, did wilfully deprive plaintiffs and others of a civil right guaranteed to them by the Constitution and laws of the United States of America and the Organic Act of Guam, to wit: their property has been confiscated without due process of law contrary to the express provisions of Title 26 U.S.C.A.; that defendants, acting in concert with the said Harry L. Mangerich and others, under color of statutory law and regulations of the United States of America and the unincorporated territory of Guam, did deprive plaintiffs and others of their property and right to property as hereinbefore alleged, to the damage of each plaintiff in the sum of Twenty-five Thousand Dollars ($25,000.00)." (R. 60.)

The fourth count is thus a charge of conspiracy resulting in appellants' being deprived of their property without due process of law.

The acts which constitute this alleged conspiracy, however, as set forth in the first and third counts, are nothing more than compliance by appellees with the provisions of the territorial income tax pertaining to withholding, levy

and distraint, as enforced by Mr. Mangerich and other officials of the Government of Guam. In other words, it merely reiterates the basic issue as to the interpretation of Section 31 of the Organic Act of Guam.

The fourth count could not possibly be sustained unless the first and third counts were also sustained, and this could be achieved only by overruling the decision of *Laguana* v. *Ansell,* supra, and, adopting appellants' view of Section 31—namely, that Section 31 does not create a separate territorial tax but merely extended the Federal income tax to Guam.

CONCLUSION

It is submitted that the District Court of Guam properly granted appellees' motion for summary judgment, that the instant appeal is without merit, and that the decision of the District Court should be affirmed.

Respectfully submitted,

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